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In The

Supreme Court of the United States

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, EARTH SYSTEMS, INC., and THE HEALTH AND WELFARE PLAN FOR EMPLOYEES AND DEPENDENTS OF EARTH SYSTEMS, INC.,

Petitioners,

v.

JANETTE KNUDSON and ERIC KNUDSON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties. Petitioner Great-West Life & Annuity Insurance Company has as a parent a publicly held company, Great-West Lifeco, Inc., which has as parent corporations Power Financial Corporation of Canada and Power Corporation of Canada, all of which are publicly traded on the Toronto Stock Exchange.

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SUMMARY OF ARGUMENT

The Court-Invited Amicus ("Amicus") asserts that an action seeking enforcement of an employee benefit plan provision obligating a person covered under such plan to reimburse the plan out of any recovery from a third party for medical expenses paid by the plan is not an action for "equitable relief" under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), as that term was interpreted by the Court in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). Instead, Amicus contends that such an action "seeks nothing but money due under an obligation to pay." Brief of Amicus Curiae at 18.[1] Such a money claim, Amicus argues, is not an "equitable" remedy even though it is being sought to specifically enforce an obligation under the terms of the Plan and to avoid unjust enrichment at the Plan's expense. "[A]llowing an injunction ***to pay money to substitute for damages***" the Amicus contends, "would simply reverse the congressional rejection of such remedies as established by *Mertens'* definitive construction of Section 502(a)(3)." *Id.* at 19 (emphasis supplied).

Moreover, even though Amicus does not dispute that a claim seeking the enforcement of a plan's reimbursement provision could be viewed as a claim for restitution based on unjust enrichment, and acknowledges that *Mertens* generally refers to restitution as a form of "equitable relief" authorized under § 502(a)(3), Amicus asserts that the type of restitutionary claim sought in this case is not equitable because "[i]t does not involve specific plan property . . . [and] the recovery amount claimed is not money that was actually obtained from the plan or the proceeds or profits of such money, let alone money

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[1] The Respondent in this case previously has informed the Court that she concurs with Petitioners' position that such relief is available under ERISA and would not contest that issue before the Court. February 2, 2001, letter from Respondent to the Court suggesting that writ was improvidently granted, at p. 3.

obtained by anyone's wrong or error." *Id.* at 18. These arguments are without merit for three reasons.

First, this Court held in *Bowen v. Massachusetts* that an action seeking to enforce an obligation to pay money is an action for "specific relief" and not one for "money damages." 487 U.S. 879, 893 (1988). *Mertens*, which unquestionably involved an attempt to recover compensatory money damages under ERISA § 502(a)(3), does not bar the injunction sought in this case under § 502(a)(3) to enforce an obligation under the provisions of a plan, merely because the obligation happens to involve the payment of money. As the *Bowen* majority favorably cited:

> Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' D. Dobbs, Handbook on the Law of Remedies 135 (1973). Thus, while in many instances an award of money is an award of damages, 'occasionally a money award is also a [specific] remedy.' *Id.* **Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms.**

487 U.S. at 895, quoting *Maryland Dept. of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (emphasis added).

Second, Amicus ignores the plain meaning of the language of ERISA § 502(a)(3)(A) which authorizes actions "***to enjoin any act or practice which violates . . . the terms of [a] plan,***" which is precisely the relief sought in the Complaint in this case. Regardless of whether or not Amicus's analysis of the historical distinctions between actions in law and actions in equity were correct under other circumstances, and, regardless of the difference between the minority and dissenting opinions in *Mertens* and *Bowen* regarding distinctions between "damages" and "specific relief" and "legal" and "equitable relief," the plain language of § 502(a)(3)(A) makes it

clear that an action to enjoin "***any practice***" which violates the terms of an ERISA plan is authorized under that provision regardless of whether or not the injunction involves the enforcement of an obligation to pay money. As the Court has recognized, if the language of an ERISA provision is clear, as § 502(a)(3)(A) is here, it need not immerse itself into common law generally or the common law of trusts in particular.

Third, *Mertens* refers to restitution as a type of equitable relief allowable under § 502(a)(3) without reference to the sorts of limitations which Amicus suggests are applicable. To the contrary, *Mertens* approvingly cites cases interpreting language in Title VII of the Civil Rights Act of 1964 analogous to the language of § 502(a)(3) as a reference point for construing the term "equitable relief." 508 U.S. at 255. Such cases uniformly hold monetary restitution, such as back pay, to be "equitable relief" regardless of the traceability or the source of such award. *See, e.g., United States v. Burke*, 504 U.S. 229 (1992).

Finally, Amicus argues that even if Petitioners' reimbursement claim is one for equitable relief under § 502(a)(3), it nevertheless is not for "appropriate" equitable relief under that section. This argument overlooks the fact that because Congress, pursuant to § 502(a)(3)(A), expressly authorized injunctive relief to enforce plan terms or to prevent violations of plan terms such as the reimbursement provision at issue, such relief by definition is "appropriate." This relief, moreover, relates to a central matter of plan administration and implicates ERISA's requirements that plans be administered and benefits be paid in accordance with plan documents. In ERISA's comprehensive scheme, Congress has already struck the balance between federal and state court relations and determined that federal courts are the exclusive forum for litigating claims for the relief provided under ERISA § 502. Accordingly, if the relief sought in this case is "equitable" within the meaning of § 502, it must *per se* be "appropriate."

Even if the Court were to determine that § 502(a)(3) does not provide for a reimbursement action based upon a plan's reimbursement provision, then ERISA's interest in a uniform system for determining rights and obligations under employee benefit plans should be found to give rise to an alternative action cognizable under the federal common law.

ARGUMENT

A. The Enforcement Of The Plan's Reimbursement Provision Constitutes "Equitable Relief"

1. The Enforcement of the Plan's Reimbursement Provision under ERISA § 502 is Consistent with this Court's Distinction Between "Money Damages" and "Specific Relief"

Amicus asserts that the enforcement of a plan reimbursement provision which requires the payment of money does not fall within the meaning of "equitable relief" under § 502(a)(3) of ERISA pursuant to the standards set forth by this Court in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). Quite the opposite is true.

In *Mertens*, this Court held that an action to recover losses to a plan allegedly resulting from an actuarial firm's failure to challenge the plan's actuarial assumptions, causing the plan to be underfunded, was "nothing other than compensatory damages – monetary relief for all losses [the] plan sustained as a result of the alleged breach of fiduciary duties." 508 U.S. at 255. In contrast with the compensatory damages unsuccessfully sought in *Mertens*, the Court interpreted "equitable relief" for purposes of § 502(a)(3) to mean "those categories of relief that were *typically* available in equity (***such as injunction, mandamus, and restitution, but not compensatory damages***)." *Id.* at 256 (emphasis supplied).

Unlike the relief sought under § 502 in *Mertens*, an action seeking the enforcement of a plan's reimbursement

provision, like the one at issue in this case, does not constitute an action for compensatory money damages, which is the only type of relief specifically excluded under § 502(a)(3) by the Court in that case. Rather, it constitutes an action for "specific relief" to prevent a violation of the terms of a plan. Such a distinction was clearly recognized by this Court in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), where the Court held that a suit by the State of Massachusetts which sought monetary reimbursement from the Federal Department of Health and Human Services for services performed by Massachusetts agencies (and purportedly reimbursable under Medicaid) constituted an action for "specific relief" rather than one for money damages. 487 U.S. at 893.

Amicus does not dispute that the Court held in *Bowen* that a suit seeking to enforce an obligation for the reimbursement of money was not an action for "money damages." Rather, he argues that *Bowen* did not turn on a distinction between "equitable" actions and other actions. Brief of Amicus Curiae at 29-30, citing *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999).[2] While it is true that the Court in *Bowen* was not required to resolve the issue of whether the action to enforce a monetary reimbursement obligation was an "equitable" action, this Court, other courts, and commentators have almost uniformly characterized "specific relief" as "equitable." In *Bowen*, for example, the Court observed:

> Our cases have long recognized the distinction between an action at law for damages – which are intended to provide a victim with monetary compensation for an injury to his person, prop-
> compensation for an injury to his person, property, or reputation – and an equitable action for

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[2] *Blue Fox* is inapposite here because it involved an attempt to enforce a lien which the Court characterized as "substitute relief" as distinguished from the "specific relief" sought in *Bowen*. *Bowen*, 487 U.S. at 893-895.

> specific relief – which may include an order providing the reinstatement of an employee with backpay, or for 'the recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions.'

487 U.S. at 893 (emphasis in original) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)). *See also* 487 U.S. at 895 ("Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specie remedy.' [internal citation omitted] ***Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms.***") (emphasis added) (quoting *Maryland Dept. of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441 (D.C. Cir. 1985)); 3 Pomeroy's Equity Jurisprudence §§ 1400-1401, at 440-441 (1883) (noting that specific performance is an equitable remedy); 3 Dan B. Dobbs, Law of Remedies: Damages – Equity – Restitution § 12.8(1), at 191 (2d ed. 1993) ("The specific performance decree originated in the old equity courts and continues today to be thought of as an equitable remedy, . . . "). *Cf. Administrative Committee v. Gauf*, 188 F.3d 767 (7th Cir. 1999) (finding an action for the enforcement of a monetary reimbursement clause to be one for equitable relief); *Blue Cross and Blue Shield of Alabama v. Sanders*, 138 F.3d 1347 (11th Cir. 1998) (same).

As demonstrated below, however, one need not agree with the majority opinion in *Bowen*, or take exception with Amicus's analysis of formal common law distinctions between relief available in law or equity to resolve the issue before the Court in this case – whether § 502(a)(3) authorizes the enforcement of a provision of an employee benefit plan that happens to involve the payment of money – because reference to the plain language of § 502(a)(3)(A) is dispositive.

2. The Enforcement of the Plan's Reimbursement Provision is Consistent with the Language of ERISA § 502(a)(3)(A) Which Authorizes Actions "To Enjoin Any Act or Practice Which Violates . . . the Terms of [a] Plan"

Petitioners' action to enforce the Plan's reimbursement provision is consistent with the Court's distinction between "money damages" and "specific relief." More significantly, it is consistent with the plain language of ERISA § 502(a)(3)(A), which authorizes actions "***to enjoin any act or practice which violates . . . the terms of [a] plan . . . .***" There is no dispute that Petitioners' Complaint in this case expressly sought such an injunction. J.A. 81, 85. Amicus argues, however, that if merely seeking an "injunction" were enough to come within § 502(a)(3), then plaintiffs could circumvent the exclusion of money damages from the type of relief authorized under § 502(a)(3) by framing their demand as one for an injunction requiring defendants to pay the money claimed. Brief of Amicus Curiae at 33. This argument overlooks the fact that the injunction sought by Petitioners in this case is not a disguised claim for "money damages" as that term has been interpreted by the Court. Rather, it is a suit to recover money owed Petitioners under the reimbursement provision of a plan and which Respondents have failed to pay in violation of the terms of the Plan. This Court has characterized such relief as "specific relief" as distinguished from compensatory damages. *See Bowen*, 487 U.S. at 893-896.

The plain language of § 502(a)(3)(A) does not merely authorize actions to enjoin violations of a plan that do not involve the payment or retention of money. Rather, such language authorizes actions to "enjoin ***any act or practice*** which violates . . . the terms of [a] plan . . . . " ERISA § 502(a)(3)(A), 29 U.S.C. § 1132(a)(3)(A) (emphasis added). Given these clear words of the statute regarding the remedy under consideration, the Court should

decline Amicus's invitation to substitute arcane common law distinctions (which Petitioners dispute) for the unambiguously expressed intent of Congress, which is that plan fiduciaries may enforce or prevent violations of plan terms in a federal court action. *See Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 254 (2000) ("We decline these suggestions to depart from the text of § 502(a)(3). In ERISA cases, '[a]s in any case of statutory construction, our analysis begins with the language of statute . . . And where the statutory language provides a clear answer, it ends there as well.' ").

Amicus concedes that "[b]y the act of accepting the benefits, a beneficiary generally becomes contractually bound to the clear terms on which they were offered" and that "[i]t is that obligation which forms the entire basis for the claim to money here." Brief of Amicus Curiae at 24.[3] Amicus, however, chooses to ignore that a primary objective of ERISA is the enforcement of ERISA plans in accordance with their terms, which is precisely what § 502(a)(3)(A) provides. *See, e.g., Gulf Life Insurance Company v. Arnold*, 809 F.2d 1520, 1523 (11th Cir. 1987) ("The purpose essential to section 1132(a)(3)(B) is to enforce the terms of [a] plan . . . "); *Health Cost Controls v. Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997) ("A primary purpose of ERISA is to ensure the integrity and primacy of the written plans.").[4]

In contrast with *Mertens*, which involved a claim for compensatory damages sought for a violation of ERISA provisions addressing breach of fiduciary duty, an

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[3] Respondent has previously conceded that *she* could have brought an ERISA action seeking to resist enforcement of the Plan's reimbursement provision. *See* Petitioners' Opening Brief at 30 n.12. Congress should not be considered to have omitted from ERISA's comprehensive enforcement scheme federal court jurisdiction over a plan fiduciary's claim to enforce the same plan terms.

[4] *See also infra*, discussion of *Egelhoff v. Egelhoff*, 121 S. Ct. 1322 (2001) at p. 15.

alleged violation of a plan lies at the heart of this case, and the relief being sought is the simple enforcement of its terms. In distinguishing money damages from "appropriate equitable relief," the Court in *Mertens* was careful to note that it was not dealing with the very type of claim here at issue:

> We note at the outset that it is far from clear that, even if this provision does make money damages available, it makes them available for the actions at issue here. It does not, after all, authorize "appropriate equitable relief" at large, but only "appropriate equitable relief" for the purpose of "redress[ing any] violations or . . . enforc[ing] any provisions" of ERISA or an ERISA plan. ***No one suggests that any term of the Kaiser plan has been violated, nor would any be enforced by the requested judgment.***

Mertens, 508 U.S. at 253 (emphasis added). *Mertens* rejected a hypertechnical reliance upon the common law of trusts to construe the scope of relief under § 502(a)(3) as to a fiduciary breach claim (*id.* at 257-258), and Amicus has given no reason (for none exists) for adopting such an approach as to the enforcement of plan terms.[5]

If the property owed by the Respondent under the Plan reimbursement provision at issue here involved something other than money, it would be evident that an action for injunction to recover such property was authorized under § 502(a)(3)(A). The fact that in the present case, the property, the withholding of which by the Respondent is alleged to violate the terms of the Plan, is money, should not transform the characterization of the nature of the relief sought, as Judge Bork held in *Maryland Dept. of Human Resources* (which case, in turn, was relied upon by this Court in *Bowen*). *See* 487 U.S. at 895

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[5] Even with respect to the contours of ERISA fiduciary duty issues, this Court will "recognize, however, that trust law does not tell the entire story." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

(citing 763 F.2d at 1446). Under either circumstance the relief being sought is to "enjoin [an] act or practice which violates . . . the terms of [a] plan." *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395, 399-403 (1946) (opining that an order for the recovery and restitution of excessive rents falls under a court's equity jurisdiction under § 205(a) of the Emergency Price Control Act to issue orders to *enjoin acts or practices that constitute or will constitute violations of the act, or to enforce compliance with the act*).

3. The Enforcement of the Plan's Reimbursement Provision is also Consistent with this Court's Characterization of Restitutionary Relief

Amicus does not dispute that the Court characterized "restitution" in *Mertens* as an example of the type of "equitable relief" authorized in a suit under § 502(a)(3)[6], and, subsequently, in *Harris Trust*, authorized a suit under § 502(a)(3) to recover monetary restitutionary relief from a nonfiduciary party-in-interest who participated in a transaction prohibited by ERISA § 406(a), 29 U.S.C. § 1106(a), although such party had not breached any duty to the plan.[7] Moreover, contrary to the position of the Ninth Circuit in *Owens* that restitution involving the payment of money is only available as "equitable relief" when the money in question constitutes "ill-gotten" assets obtained "by any fraud or wrong-doing,"[8] Amicus acknowledges that "***the defendant need not have engaged in wrongdoing to be subject to equitable remedies for restitution, even where money was at issue, a point established in Harris Trust and not in dispute.***" Brief of Amicus Curiae at 28-29 (emphasis supplied).

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[6] *Mertens*, 508 U.S. at 256.

[7] *Harris Trust and Savings v. Salomon Smith Barney Inc.*, 530 U.S. 238, 249-253 (2000).

[8] *FMC Medical Plan v. Owens*, 122 F.3d 1258, 1261 (9th Cir. 1997).

Notwithstanding these concessions, Amicus argues that a suit such as the present one which seeks the reimbursement of funds allegedly retained in violation of the terms of the Plan is not the sort of restitutionary relief available under § 502(a)(3) because the money sought from Respondents is not specifically traceable to the Plan[9] and was not transferred to Respondents by a wrongdoer. Brief of Amicus Curiae at 22-29. "Money not specifically traceable to wrongly received funds", Amicus argues, falls outside of the type of restitutionary relief available in equity as distinguished from restitutionary relief available in law (*e.g.*, assumpsit). *Id.* at 27. Nothing, however, in the language or objectives of ERISA or the decisions of this Court suggests that § 502(a)(3) is intended to draw this highly formal and restrictive distinction. To the contrary, as Amicus correctly notes for other purposes (*id.* at 21), *Mertens* explicitly rejected defining "equitable relief" for purposes of § 502(a)(3) with reference to whether or not a particular form of relief such as restitution was available in an equity court or a court of law. 508 U.S. at 257-258.

That this Court intends the scope of the restitutionary relief available under § 502(a)(3) to be more expansive than suggested by Amicus is evident in the Court's prior decisions. In *Mertens*, the Court analogized interpretation of the term "appropriate equitable relief" under § 502(a)(3) to the interpretation of similar language in Title VII of the Civil Rights Act of 1964 (before its 1991 amendment). 508 U.S. at 255. In this regard, decisions of this Court and the lower courts uniformly recognize the award of back pay in a Title VII case as equitable relief without regard to the specific traceability or derivation of the funds awarded. *See, e.g., United States v. Burke*, 504 U.S. 229, 238 (1992); *Wilson v. Daimler Chrysler Corp.*, 236

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[9] Assuming *arguendo* that traceability were required for restitutionary relief, it is clearly not required for an injunction or specific performance.

F.3d 827, 830 (7th Cir. 2001); *Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1347 (10th Cir. 1994).[10]

Likewise, Amicus spends pages suggesting that the relief Petitioners seek is not truly "equitable relief" or "specific relief" because Petitioners are not seeking the return of the "specific property" paid by the Plan or possessed by the Respondent. However, Amicus's argument is flawed to the extent it focuses on anything other than the *nature* of the relief sought – the focus of this Court's attention in *Bowen*. This Court has already made clear that specific relief is that which attempts to give to the plaintiff that to which it was already entitled. *Bowen*, 487 U.S. at 895, citing *Maryland Dept. of Human Resources*, 763 F.2d at 1446. As the *nature* of the relief sought is the primary focus, whether the defendant is in possession of the precise property is not dispositive. *See, e.g., America's Community Bankers v. Federal Deposit Ins. Corp.*, 200 F.3d 822, 829-830 (D.C. Cir. 2000) (rejecting defendant's claim that the relief sought by plaintiffs constituted money damages, as distinguished from specific relief, notwithstanding the fact that the party from whom the relief was sought was no longer in possession of the specific funds at issue: "That the FDIC no longer possesses the *precise funds* collected is not determinative of this analysis.") (emphasis added).

Finally, that monetary restitution is generally intended to be available as a remedy to prevent unjust enrichment at the expense of a plan and its participants, regardless of the traceability or source of the funds at issue, is confirmed in the Court's favorable citation in

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[10] In a like vein, all federal courts of appeals to have addressed the issue have concluded that a participant's claim for monetary relief under ERISA § 502(a)(1)(B) is an equitable action as to which no right to jury trial exists. *See Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156 (10th Cir. 1998) and *Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251 (2d Cir. 1996).

Harris Trust of the following explication of restitution in an earlier case:

> Whenever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein[.]

Harris Trust, 530 U.S. at 250-251 (quoting *Moore v. Crawford*, 130 U.S. 122, 128 (1899) (quoting 2 Pomeroy, Equity Jurisprudence § 1053, pp. 628-629 (1886))). *See also Adams v. Cyprus Amax Minerals Co.*, 149 F.3d at 1156, 1162 (1998) (noting that "[b]y definition, an action for restitution has for its primary purpose the 'taking from the defendant and restoring to the plaintiff something to which the plaintiff is entitled' " and finding that the "payment of monetary benefits allegedly wrongly held" fits this definition) (quoting Restatement (First) of Restitution Pt. I, Ch. 8, To. 2, Intro. Note (1936 Main Vol.)). It is undeniably "unconscientious" for Respondents to fail to honor their obligations under the terms of the Plan's reimbursement provision.

B. The Enforcement Of Plan Terms Is "Appropriate" Relief Under ERISA § 502(a)(3)

1. The Petitioners' Reimbursement Claim is "Appropriate" by the Very Terms of the Statute

ERISA § 502(a)(3)(A) provides as a remedy a civil action "to enjoin any act or practice which violates . . . the terms of the plan, . . . " Congress thus has clearly stated that such relief as sought here is proper. Amicus's argument that a reimbursement action is, even if equitable, nevertheless not "appropriate" equitable relief (Brief of Amicus Curiae at 39, *et seq.*), relies upon ERISA

§ 502(a)(3)(B), which ***also*** allows a civil action "to obtain *other* appropriate equitable relief (i) to redress such violations or (ii) to enforce . . . the terms of the plan . . . ." Congress' use of the adjective "other" in subsection (a)(3)(B) confirms that the specific equitable relief of the type provided by (a)(3)(A), is, by definition, "appropriate equitable relief." A contrary conclusion would result in, at best, § 502(a)(3)(A) being accorded a strained meaning, if not rendered entirely meaningless. *Rose v. Lundy*, 455 U.S. 509, 517-518 (1982) (courts should endeavor to give meaning to statutory language when possible) (citing *United States v. Sisson*, 399 U.S. 267, 297-298 (1970)).

Moreover, Amicus asks the Court, for purposes of its argument that the relief sought in this case is not "appropriate," to assume that it is, in fact, "equitable." Under that assumption (which is, in fact, correct), any conclusion that such "equitable relief" was not "appropriate" would be totally inconsistent with the principle well established by this Court that ERISA is the "exclusive" vehicle for obtaining any relief available through § 502. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-65 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990). If the relief sought in this case to enforce the terms of an ERISA plan is "equitable" and is not available under any provision of § 502, other than § 502(a)(3), consistent with the Court's recognition of the exclusivity of § 502 for enforcing relief available thereunder, such relief must be regarded as "appropriate" *per se*.

2. In Any Event, the Enforcement of a Plan Reimbursement Provision is an Appropriate Remedy Consistent with ERISA's Purposes

Amicus asserts that allowing Petitioners to pursue their reimbursement claim in federal court would conflict with ERISA policy, because of increased litigation expenses, and create potential for friction between federal and state courts. (*See* Brief of Amicus Curiae at 41, *et*

seq.). The short answer is that since Congress has clearly provided for the relief Petitioners seek, the courts need not "adjust the balance between . . . competing goals that the text adopted by Congress has struck." *Mertens*, 508 U.S. at 263. In *Varity*, a situation which, unlike here, *required* this Court to fashion "appropriate" equitable relief, the Court instructed courts to "respect the 'policy choices reflected in the inclusion of certain remedies and the exclusion of others.' " 516 U.S. at 515, citing *Pilot Life Ins. Co.*, 481 U.S. at 54.

Evidence of Congressional intent supportive of a reimbursement action grounded in the enforcement of plan terms can be found throughout ERISA's "comprehensive and reticulated" scheme. *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980). The Petitioners' reimbursement claim, like the state law which the Court found preempted in *Egelhoff v. Egelhoff*, 121 S. Ct. 1322, 1327-1328 (2001), "implicates an area of core ERISA concern," that being ERISA's commands that (i) a plan " 'specify the basis on which payments are made to and from the plan,' § 1102(4)," and (ii) the fiduciary shall administer the plan " 'in accordance with the documents and instruments governing the plan,' § 1104(a)(1)(D)[.]" (internal citations omitted). Indeed, the Court called the payment of benefits "a central matter of plan administration." *Id.* at 1328. Eliminating a remedy for reimbursement clearly provided under the terms of an ERISA plan would, no less than the state statute in *Egelhoff*, "directly conflict[ ] with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents." *Id.* at 1329.[11] Congress

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[11] The existence of a remedy under § 502(a)(3) for specific enforcement of a plan reimbursement provision finds an analog in a plan fiduciary's duty to collect delinquent contributions an employer is obligated by plan terms to make to a multiemployer plan, 29 U.S.C. § 1145. *See Moore v. Am. Fed. of Tel. & Radio Artists*, 216 F.3d 1236 (11th Cir. 2000).

indisputably imposed these obligations upon the fiduciaries of the Petitioners' plan, with the concomitant obligation that they enforce such terms. Nothing in ERISA suggests that Congress meant to deprive federal courts of jurisdiction to hear such claims.[12]

Recognizing that the Ninth Circuit's decision would subject plans to an intolerable, non-uniform system of state regulation, at odds with Congressional purposes and with this Court's decision in *FMC v. Holliday*,[13] if not

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[12] In any event, the scenario of "harmful duplicative state and federal court litigation" (Brief of Amicus at 41) that Amicus posits is unsupported. In federal courts (outside the Ninth Circuit) where reimbursement claims are authorized, no such maelstrom has developed. *See Lyons v. Philip Morris Inc.*, 225 F.3d 909, 913 (8th Cir. 2000) ("We do not share the . . . concern that *Southern Council* and this decision [holding that a claim for specific performance of plan's subrogation clause falls within § 502(a)(3)'s exclusive jurisdiction] will 'federalize' personal-injury litigation involving ERISA beneficiaries."). Indeed, the unified front of employers/plan sponsors, insurers, and administrators, as well as the United States, as *amici* in support of Petitioners, offers convincing proof that plans benefit, not suffer, from the availability of such a remedy. Their conviction has been born out of the actual experience of benefit plans in litigating reimbursement claims in federal and state courts. For example, in most states a reimbursement claim would be a contingent, totally separate action (not unlike that for contribution or indemnity) that does not even ripen until after resolution of the underlying tort claim. *See Unisys Medical Plan v. Timm*, 98 F.3d 971, 973 (7th Cir. 1996). Thus, an entirely separate lawsuit is generally required, whether in state or federal court.

[13] In *FMC Corp. v. Holliday*, this Court specifically recognized that relegating a plan's recoupment rights to a "patchwork scheme of [state] regulation would introduce considerable inefficiencies in benefit program operation, . . . " 498 U.S. 52, 60 (1990) (internal citation and quotation marks omitted) (Pennsylvania's anti-subrogation law which prohibited plans from being structured in a manner requiring

with no remedy at all, *see Jefferson-Pilot Life Ins. Co. v. Krafka*.[14] Amicus asserts that such a problem could be avoided by state courts applying "relevant federal law principles." Brief of Amicus Curiae at 47-49. In other words, this Court should close the doors of federal courts to such actions but declare that state courts should develop a federal common law of ERISA to be applied in state courts. To accomplish this, which Amicus says would leave reimbursement claims governed by the same uniform federal substantive law, Amicus argues that state court procedures and jurisdiction (called "mechanisms" by Amicus) should not be preempted. *Id.* The issue in this case, however, neither asks nor requires the Court to address any issue of ERISA preemption. Moreover, Amicus does not (and cannot) offer any explanation as to how to assure that state courts uniformly adopt federal substantive law in the absence of federal jurisdiction to interpret and enforce plan reimbursement provisions.

In any event, assuming, as Amicus's argument on this point does, that Petitioners have a claim for reimbursement governed by federal law, Congress could not have been more clear on where a claim under § 502(a)(3) must be litigated – federal court jurisdiction under § 502(e) is exclusive. Moreover, the Court in *FMC v. Holliday* clearly recognized the inefficiencies of applying a "patchwork scheme of [state] regulation . . . " to plan reimbursement and subrogation rights. 498 U.S. at 60. Consequently, as held in *Jefferson-Pilot v. Krafka*, a claim in state court to

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reimbursement in the event of recovery from a third party found preempted).

[14] *Jefferson-Pilot Life Ins. Co. v. Krafka* was an action alleging violation of the terms of an employee benefit plan and brought to enforce the reimbursement provision of the policy. The *Jefferson-Pilot* court ruled that the plaintiff's state common law claims "relate to" the plan and were therefore preempted. 57 Cal. Rptr. 2d 723, 726 (Cal. Ct. App. 1996).

enforce a plan reimbursement provision should be pre-empted. Thus, Amicus's argument would have the effect of leaving an employee benefit plan without a remedy to enforce the plan's terms, a result inconsistent with this Court's recognition of § 502(a)(3) as a "safety net" to provide relief that is consistent with ERISA's objectives but that § 502 does not elsewhere provide. *See Varity v. Howe*, 516 U.S. 489, 512 (1996).

Furthermore, federal courts are, as Congress intended, and as this Court and the federal courts of appeals have recognized, the natural place to develop those federal rules of plan interpretation, including, where appropriate, federal common law. *Provident Life & Accident Insurance Co. v. Waller*, 906 F.2d 985, 990 (4th Cir. 1990) ("[B]oth the Supreme Court and this circuit recently gave express authorization for federal courts to develop a federal common law of rights and obligations under ERISA-regulated plans.") (citing *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989)) (internal quotation marks omitted). Indeed, outside the Ninth Circuit this is happening with dispatch.

Accordingly, even in the event Congress is found to have left to the courts the task of determining, on a case-by-case basis, whether an action under ERISA between a plan fiduciary and participant seeking to enforce plan terms is "appropriate," the Petitioners' reimbursement action most certainly is.

C. Federal Common Law Provides An Alternative Remedy For Reimbursement Even If ERISA § 502(a)(3) Does Not

Aside from disputing the ability of federal courts to recognize federal common law remedies to fill interstices in ERISA's express remedial scheme where appropriate and necessary to effectuate the purpose of ERISA, Amicus asserts two procedural bars to Petitioners' alternative argument that federal common law provides a

remedy for reimbursement of expenses that Petitioners have already paid.

First, Amicus states that the issue on which this Court granted certiorari is whether the term "appropriate equitable relief" under § 502(a)(3) is broad enough to encompass a reimbursement claim by a plan fiduciary against a plan participant for medical expenses that the participant recovers from a third-party tortfeasor. Brief of Amicus Curiae at 39. The issue on which the Court granted certiorari was not so confined. Rather, Petitioners asked the Court to consider whether the Ninth Circuit erred in holding "that federal courts lack subject matter jurisdiction over actions brought by ERISA plan fiduciaries to enforce reimbursement provisions." Petition for Certiorari, Question 1.

Second, Amicus argues that this issue was not raised in the Ninth Circuit and thus cannot be addressed by this Court. Brief of Amicus Curiae at 39. Again, however, Petitioners' arguments in the Ninth Circuit were not confined to remedies available under § 502(a)(3). Rather, Petitioners' opening brief noted the applicability of federal law to mold appropriate remedies under ERISA. (Appellants' Brief of Dec. 8, 1998 at 17-19). Ninth Circuit precedent, however, precluded further consideration because the court adhered to circuit precedent that it lacked subject matter jurisdiction to entertain the claim. J.A. 253. Raising the issue of federal common law providing a remedy under ERISA would have been futile, and the law does not require the performance of a futile act. *See Ohio v. Roberts*, 448 U.S. 56, 74 (1980).

Accordingly, this Court, in determining that a plan's claim for reimbursement well serves ERISA's purposes, may find the remedy alternatively available under § 502(a)(3) or the federal common law, either of which claims can properly be brought in federal court.

CONCLUSION

Wherefore, for the additional foregoing reasons, Petitioners respectfully ask that this Honorable Court reverse the judgment of the Ninth Circuit and remand the matter for further proceedings in which the court shall determine the amount of reimbursement recovery that Petitioners are entitled to under the Plan reimbursement provision.

Respectfully submitted,

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